

Message Text

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C O N F I D E N T I A L SECTION 01 OF 03 BERLIN 08369

E.O. 11652: GDS

TAGS: CGEN, GE, US

SUBJECT: US-GDR CONSULAR CONVENTION

REF: A) STATE 25733, B) BERLIN 8041, C) BONN 17666 AND
PREVIOUS, D) STATE 261674, E STATE 246330

1. SUMMARY: THE EMBASSY BELIEVES THE GDR IS MAKING A CONSTRUCTIVE EFFORT TO RESOLVE THE NATIONALITY ISSUE IMPASSE IN THE CONSULAR CONVENTION. WHILE THE DRAFT LETTER EXCHANGE THEY HAVE GIVEN US MAY CONTAIN UN-ACCEPTABLE LANGUAGE, WE FIND THE POSITIONS TAKEN BY THE FRENCH, WESTERN GERMANS, AND THE UK IN THE BONN GROUP EXTREME ON THE GERMAN NATIONALITY QUESTION. WE THINK IT WOULD BE IMPOSSIBLE TO SELL SUCH LANGUAGE TO THE GDR, AND ARE OF THE VIEW THAT WE MUST HAVE SOME FLEXIBILITY ON THIS PARTICULAR ISSUE. IN THIS CONNECTION, WE THINK IT IMPORTANT THAT WHATEVER LANGUAGE IS AGREED ON FOR TRANSMISSION TO THE GDR SHOULD BE PROVIDED TO US SOON WITH ENOUGH FLEXIBILITY FOR AN ACCEPTABLE "FALL BACK" POSITION. END SUMMARY.

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2. THE EMBASSY APPRECIATES THE PROMPT, SERIOUS ATTENTION THE DEPT. IS GIVING THE EXCHANGE OF DRAFT LETTERS ON NATIONALITY WHICH GDR DEP FORMIN MOLDT HANDED THE AMBASSADOR. WE BELIEVE THE GDR MOVE DEMONSTRATES ITS INTENTION TO TRY TO RESOLVE THE NATIONALITY ISSUE ALONG THE LINES THE AMBASSADOR SUGGESTED AND THAT THEY WOULD LIKE TO DO SO PROMPTLY. MOLDT'S APPROACH TO THE

AMBASSADOR ALSO SHOWS SOME FLEXIBILITY ON THE GDR'S PART, I.E., TWO ALTERNATIVE EXCHANGES OF LETTERS AS WELL AS HIS STATEMENT THAT "THERE WERE SEVERAL POSSIBLE ALTERNATIVE WAYS OF DEALING WITH THIS WHICH WOULD ALLOW BOTH SIDES TO SAVE FACE AND WOULD SERVE THE INTERESTS OF BOTH PARTIES". IT SEEMS EVIDENT FROM THE DRAFT LETTERS THAT, AT LEAST INITIALLY, THE GDR IS THINKING OF AN EXCHANGE OF LETTERS CONTAINING IDENTICAL TEXTS, AND THAT IN SOME FASHION EACH SIDE WOULD DEFINE WHAT IS A NATIONAL OF ITS OWN COUNTRY.

3. REF A PARA 2 STATES THAT THE PRESENT WORDING OF THE GDR DRAFT TEXT DOES NOT APPEAR TO BE ACCEPTABLE. WE CAN UNDERSTAND THIS WITH RESPECT TO THE LONGER VERSION OF THE DRAFT STATEMENT (REFTEL B, PARA 4), SINCE WE WOULD BE ACKNOWLEDGING THE COMPETENCE OF THE GDR VIS-A-VIS GERMAN NATIONALS AS DEFINED BY GDR DOMESTIC LAW, AND PARTICULARLY WHEN THEY ARE IN THE US. EVEN THOUGH THE STATEMENT DOES NOT SAY SOLE OR EXCLUSIVE COMPETENCE, IT SEEMS OBVIOUS THE INTENT OF THE LANGUAGE IS TO PRECLUDE ACCESS BY THE FRG TO SUCH PERSONS - AND THEREFORE WOULD BE UNACCEPTABLE ALSO FOR THIS REASON. WE ASSUME THE LONGER VERSION IS ALSO UNACCEPTABLE BECAUSE OF THE REFERENCE TO A SPECIFIC ARTICLE (40), WHICH THEREFORE WOULD IMPLY AN OPERATIONAL LINK BETWEEN THE CONVENTION AND THE LETTERS.

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4. AT THE SAME TIME THE SHORTER VERSION (REFTEL B, PARA 12) APPEARS TO US ACCEPTABLE AS A GDR STATEMENT ABOUT ITS POSITION ON GDR NATIONALITY, SINCE IT IS NOT INCORPORATED IN THE CONVENTION AND IF WE DO NOT INDICATE IN OUR STATEMENT AGREEMENT WITH THAT POSITION. WE DO NOT THINK WE CAN EXPECT THE GDR TO BE ANY LESS SPECIFIC ABOUT ITS OWN NATIONALITY IN VIEW OF OUR PROPOSAL THAT EACH SIDE WOULD MAKE KNOWN ITS POSITION ON NATIONALITY IN SEPARATE STATEMENTS. IT ALSO IS UNREALISTIC TO EXPECT THEM TO BE LESS SPECIFIC WHEN THEY ALREADY HAVE SUCH WORDING IN A NUMBER OF CONSULAR CONVENTIONS, INCLUDING WITH THE BRITISH. IT MAY BE THAT THE GDR WILL TAKE THE POSITION - AT LEAST INITIALLY AS A NEGOTIATING TACTIC - THAT THE U.S. STATEMENT SHOULD CONFINE ITSELF TO DEFINING U.S. NATIONALITY RATHER THAN EXPLAINING WHY A DEFINITION OF NATIONALITY SHOULD NOT BE INCLUDED IN A CONSULAR CONVENTION OR GIVING THE U.S. POSITION ON GERMAN NATIONALITY. AT LEAST THIS SEEMS TO BE THE INTENT OF THE SHORT U.S. DRAFT STATEMENT GIVEN US BY MOLDT.

5. WE ASSUME THAT WHAT IS UNACCEPTABLE IN THE SHORT

VERSION OF THE U.S. STATEMENT GIVEN US BY MOLDT IS THAT IT DOES NOT MAKE CLEAR THAT OUR POSITION ON NATIONALITY DIFFERS FROM THAT OF THE GDR. IT MAY ALSO BE THAT THE WORD "NOTED" COULD BE TAKEN TO MEAN ACCEPTANCE OF THE GDR POSITION ON THE NATIONALITY ISSUE -- AND THEREFORE UNACCEPTABLE. IF, HOWEVER, "NOTED" DOES NOT HAVE SUCH A LEGAL CONNOTATION, IT SEEMS TO US THE SHORTER FORM FOR THE GDR LETTER EXPLAINING ITS POSITION COULD BE AN ACCEPTABLE MINIMUM IF, REPEAT IF, THE GDR WERE WILLING

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TO ACCEPT A U.S. STATEMENT OF DIFFERENT CONTENT SETTING
OUT OUR POSITION ON NATIONALITY.

6. IN THIS CONNECTION WE HAVE READ THE PROPOSED U.S. DRAFT GIVEN THE BONN GROUP (REFTEL E) TOGETHER WITH THE CHANGES PROPOSED BY THE FRG AND THE FRENCH, SUPPORTED BY THE UK (REFTEL C AND OTHER). WE HAVE SOUGHT TO DO SO IN TERMS OF WHAT WE THINK MIGHT BE ACCEPTABLE TO THE GDR (REFTEL D, PARA 5). WE ASSUME THE GDR COULD GO ALONG WITH THE PREAMBLE AND PARA 1 OF THE DRAFT U.S. STATEMENT AND THE SUGGESTED CHANGES TO THEM (REFTEL C). WE THINK THE GDR WOULD WELCOME THE FIRST SENTENCE OF PARA B OF THE DRAFT U.S. STATEMENT AND PRESUMABLY WOULD WANT TO INCORPORATE IT IN THEIR STATEMENT. WE NOTE THAT VON STADEN STATED THE FRG, WITH APPROPRIATE AMPLIFICATION BY US IN THE FORM OF A RESERVATION, WOULD ALSO BE WILLING TO ACCEPT SUCH A STATEMENT. WE THINK THE GDR, LIKE THE FRG, WOULD BALK AT REFERENCES TO INTERNATIONAL LAW AND RESOLVING DISPUTES THROUGH INTERNATIONAL LAW.

IF SUCH REFERENCES ARE NOT FUNDAMENTAL TO OUR POSITION,
WE SHOULD BE PREPARED TO DROP THEM AT SOME POINT IN
THE DELIBERATIONS.
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7. ON THE KEY ISSUE OF WHETHER THE GDR WOULD ACCEPT
SOMETHING ALONG THE LINES OF THE FRENCH FORMULATION ON
A U.S. RESERVATION ON THE QUESTION OF GERMAN NATIONALITY,
WE DO NOT THINK IT COULD BE SOLD TO THE GDR. THE GDR
VERY LIKELY WOULD RESIST STRONGLY ANY REFERENCE TO A U.S.
POSITION ON GERMAN NATIONALITY AND PRESUMABLY WOULD MAIN-
TAIN THAT ANY SUCH REFERENCES ARE (1) UNNECESSARY IN AN
EXCHANGE OF DOCUMENTS ON A BILATERAL CONVENTION AND (2)
AN EFFORT TO INTRODUCE A POLITICAL ELEMENT WHERE IT DOES
NOT BELONG. IN THIS CONNECTION WE CONCUR WITH THE VIEW
EXPRESSED BY THE U.S. REP IN THE BONN GROUP THAT A
REFERENCE TO A U.S. POSITION ON GERMAN NATIONALITY WOULD
RUN COUNTER TO THE PURPOSE OF THE U.S. STATEMENT, I.E.,
TO EXPLAIN WHY IT WAS UNNECESSARY TO DEFINE NATIONALITY IN
THE CONTEXT OF A BILATERAL CONSULAR CONVENTION (PARA 9,
REF C). IT WOULD, AS FAR AS WE CAN JUDGE, GO BEYOND
ANYTHING WE OR THE ALLIES HAVE SAID EXPLICITLY ON THE
SUBJECT, AND WE ARE NOT PERSUADED BY BRITISH BONN GROUP
REP EYER'S ASSERTIONS (PARA 4, REFC) TO THE CONTRARY.

8. IF THE DEPARTMENT BELIEVES IT NECESSARY TO STATE IN
THE LETTER EXCHANGE THE U.S. POSITION ON GERMAN NATION-
ALITY, WE THINK THE ORIGINAL U.S. DRAFT LANGUAGE HAS A
BETTER CHANCE THAN THE FRENCH OR UK LANGUAGE OF BEING SOLD
TO THE GDR. A POSSIBLE COMPROMISE MIGHT BE AS FOLLOWS:
"IN THIS REGARD, THE UNITED STATES NOTES THAT THE
CONSULAR CONVENTION BETWEEN THE USA AND THE GDR CANNOT
AFFECT DIFFERENCES REGARDING THE ISSUE OF
GERMAN NATIONALITY OR THE VARIOUS POSITIONS WHICH HAVE
BEEN TAKEN ON THIS ISSUE." THIS FORMULATION IS NOT AS
SPECIFIC OR GOES AS FAR AS THE FRG (AND FRENCH) WOULD
LIKE, BUT IT GOES FURTHER THAN THE ORIGINAL U.S. DRAFT
STATEMENT, AND CAN HARDLY BE CONSIDERED TO BE NEUTRAL.
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IT ALSO MAY BE PALATABLE TO THE GDR SINCE IT WOULD NOT
IGNORE THE FACT THAT THE GDR HAS A POSITION ON THE ISSUE.

9. IN VIEW OF THE FOREGOING, WE WOULD SUGGEST A DRAFT
U.S. LETTER ALONG THE FOLLOWING LINES:

BEGIN TEXT: (COMPLIMENTARY OPENING) ... AND HAS THE HONOR TO REFER TO THE CONSULAR CONVENTION TO BE SIGNED TODAY BETWEEN THE UNITED STATES OF AMERICA AND THE GERMAN DEMOCRATIC REPUBLIC. IN THIS CONNECTION AND WITH REFERENCE TO THE DISCUSSIONS WHICH TOOK PLACE PRIOR TO THE SIGNING OF THIS CONVENTION ON THE SUBJECT OF NATIONALITY, A TERM WHICH IS NOT DEFINED IN THE CONVENTION ITSELF, I HAVE THE HONOR TO CONVEY THE VIEWS OF THE UNITED STATES GOVERNMENT RESPECTING A DEFINITION OF THIS TERM AS IT RELATES TO THE CONSULAR CONVENTION AS FOLLOWS:

A. IT IS THE POSITION OF THE UNITED STATES THAT IT IS INAPPROPRIATE TO INCLUDE A DEFINITION OF NATIONALITY IN A BILATERAL CONSULAR CONVENTION. THERE IS NO U.S. PRECEDENT SUPPORTING INCLUSION OF SUCH A DEFINITION, AND IT IS CERTAINLY CONTRARY TO U.S. PRACTICE TO DO SO.

B. DETERMINATION OF NATIONALITY IS A MATTER WITHIN THE CONTROL OF EACH SOVEREIGN STATE AND, IN THIS REGARD, THE U.S. GOVERNMENT MUST PRESERVE ITS RIGHT TO DETERMINE THE CONDITION UNDER WHICH A PERSON ACQUIRES OR LOSES U.S. NATIONALITY.

C. THE DEFINITION OF NATIONALITY IN A BILATERAL TREATY HAS NO BINDING EFFECT UPON THIRD COUNTRIES WHICH MAY

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EMBRACE INDEPENDENT VIEWS. MOREOVER, DISPUTES WITH THIRD COUNTRIES REGARDING THE NATIONALITY OF PERSONS CANNOT BE AFFECTED BY BILATERAL TREATIES TO WHICH THE THIRD COUNTRY

IS NOT A PARTY. IN THIS RESPECT, THE UNITED STATES NOTES THAT THE CONSULAR CONVENTION BETWEEN THE UNITED STATES AND THE GERMAN DEMOCRATIC REPUBLIC CANNOT AFFECT DIFFERENCES REGARDING THE ISSUE OF GERMAN NATIONALITY OR THE VARIOUS POSITIONS WHICH HAVE BEEN TAKEN ON THIS ISSUE. COMPLIMENTARY CLOSE. END TEXT.

10. THIS LANGUAGE, WHICH WOULD BE DIFFICULT TO SELL HERE, INCORPORATES THE ESSENTIALS OF OUR POSITION, TAKES INTO ACCOUNT VON STADEN'S REQUESTS, AND GOES CONSIDERABLY FARTHER TOWARD MEETING THE FRG CONCERNS THAN DID THE UK/GDR CONSULAR CONVENTION, AND ATTENDANT FRG/UK NOTE.

11. WE THINK IT IS ESSENTIAL, IN OUR CONSULTATIONS IN BONN, TO DETERMINE WHAT OUR MAXIMUM AND MINIMUM POSITIONS ARE ON THE CONTENT OF AN EXCHANGE OF LETTERS WITH THE GDR CONSISTENT WITH US INTERESTS, RESPECT FOR FRG CONCERNS, AND OUR DESIRE TO ARRIVE AT A CONCLUSION THAT GETS THE CONVENTION BEHIND US. WE WOULD HOPE, AND EXPECT, THAT THE CONFIDENTIAL

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FRG, AS WELL AS THE FRENCH AND BRITISH, WILL NOT BE SO INSISTENT ON A MAXIMUM POSITION AS TO DOOM THE DIALOGUE WITH THE GDR FROM THE START. IT WOULD THEREFORE BE USEFUL FOR US TO KNOW WHAT THE DEPARTMENT BELIEVES IS ACCEPTABLE MINIMUM LANGUAGE IN ORDER TO AVOID PROLONGING THE DISCUSSIONS IN THE BONN GROUP AND WITH THE GDR AND ALSO TO AVOID LATER CHARGES OF BAD FAITH FROM OUR ALLIES.

12. WE APPRECIATE THE ATTENTION THIS MATTER IS RECEIVING IN THE DEPARTMENT BECAUSE WE THINK IT IS IMPORTANT TO BE ABLE TO GO BACK TO THE EAST GERMANS AT AN EARLY DATE TO CONTINUE THE DIALOGUE. DEPUTY FOREIGN MINISTER GRUNERT ASKED THE AMBASSADOR RECENTLY WHAT PROGRESS WE WERE MAKING ON THE CONSULAR CONVENTION, FOR EXAMPLE. IN THIS CONNECTION, WE HAVE NOT INFORMED THE MFA ALONG THE LINES OF PARA 3, REFTEL A. WHEN WE RAISE THE ISSUE WITH THEM, WE WOULD PREFER TO BE ABLE TO PROVIDE (A) SUBSTANTIVE INFORMAL COMMENTS ON THEIR PROPOSED DRAFTS, (B) INFORMAL U.S. DRAFT LETTERS OR THE APPROXIMATE DATE WHEN WE WILL BE PRESENTING OUR SUGGESTED LANGUAGE. WE HOPE THEREFORE THAT THE DRAFTING PROCESS IN THE DEPARTMENT AND CONSULTATIONS IN THE BONN GROUP CAN BE ACCELERATED. BOLEN

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